

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	CRIMINAL ACTION
	:	NO. 12-176-02
v.	:	
	:	
NICOLE FRYE	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

June 20, 2018

Petitioner Nicole Frye ("Petitioner") brings this pro se motion to vacate, set aside, or correct her sentence under 28 U.S.C. § 2255 (the "Petition") challenging her 120-month sentence following her guilty plea to nine charges related to the distribution of methamphetamine. Petitioner argues that her sentence should be reduced based her minor rule in the offense, pursuant to Amendment 794 to the Sentencing Guidelines, which was adopted over three years after she was sentenced. The Government has moved to dismiss the Petition. For the reasons that follow, the Court will deny the Petition.

I. BACKGROUND AND PROCEDURAL HISTORY

Petitioner Nicole Frye was indicted by a grand jury on April 18, 2012 with one count of conspiracy to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C.

§ 846 (Count 1); three counts of distribution of 5 grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) and 18 U.S.C. § 2 (Counts 2, 4, 6); three counts of distribution of 5 grams or more of methamphetamine within 1000 feet of a school in violation of 21 U.S.C. § 860 and 18 U.S.C. § 2 (Counts 3, 5, 7); and two counts of use of a communication facility in furtherance of a drug-trafficking crime in violation of 21 U.S.C. § 843(b). ECF No. 1.

Petitioner pleaded guilty to all counts against her on October 5, 2012. ECF No. 72. On June 10, 2013, the Court sentenced Petitioner to 120 months of imprisonment on Count 1, 60 months of imprisonment on Counts 3, 5, and 7, and 48 months of imprisonment on Counts 10 and 14, all to run concurrently. See Judgment, ECF No. 138. The Court also imposed an eight-year term of supervised release, a special assessment of \$800, and a fine of \$1,000. See id. Although Petitioner's sentencing guidelines range was 210 to 262 months, in light of Petitioner's cooperation, the Court imposed only the mandatory minimum sentence of 120 months. See id.

Petitioner did not appeal her conviction or sentence. On August 29, 2016, Petitioner filed a motion to vacate, set aside, or correct her conviction or sentence under 28 U.S.C. § 2255. ECF No. 157. Petitioner filed a corrected petition, using the standard form, on November 21, 2016. ECF No. 159. In

response, the Government filed a motion to dismiss the § 2255 petition on January 13, 2017. ECF No. 163. The motion is now ripe for disposition.

II. LEGAL STANDARDS

A federal prisoner "claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Such a prisoner may attack his sentence on any of the following grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; or (3) the sentence was in excess of the maximum authorized by law. Id. § 2255(a). An evidentiary hearing on the merits of a prisoner's claims is necessary unless it is clear from the record, viewed in the light most favorable to the petitioner, that he is not entitled to relief. Id. § 2255(b).

The court is to construe a prisoner's pro se pleading liberally, Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), but "vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation," United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000).

III. DISCUSSION

Petitioner brings one claim: that she qualifies for a two-point minor role reduction in her total offense level calculation under the Sentencing Guidelines on the basis of a retroactive law that was enacted following her sentencing. See Pet. at 5. The Government has moved to dismiss the Petition, arguing that (1) Petitioner knowingly and intelligently waived her right to collaterally challenge her sentence except under limited circumstances that do not apply here; (2) the Petition is untimely; and (3) Petitioner's claim is factually and legally baseless, because she was sentenced to the mandatory minimum sentence, rendering her guideline range irrelevant. See Gov't Mot. Dismiss, ECF No. 163.

A. The Petition is Untimely

A criminal defendant may petition for relief under 28 U.S.C. § 2255 within one year of the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by

the Supreme Court and made retroactively applicable to cases on collateral review; or

- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Here, Petitioner was sentenced and judgment was entered on June 20, 2013. She did not appeal her conviction or sentence. Therefore, her conviction became final on June 24, 2013, the date her time to appeal expired. See Fed. R. App. P. 4(b)(1) (providing that a defendant's notice of appeal must be filed within 14 days after the later of the entry of the judgment or order being appealed, or the filing of the government's notice of appeal). As a result, Petitioner was required to file her § 2255 petition by June 24, 2014. See 28 U.S.C. § 2255(f)(1). Petitioner did not file her § 2255 petition until August 29, 2016, more than two years after the limitations period expired. Petitioner does not offer any reason why the Court should apply equitable tolling. Therefore, the Petition is untimely.

B. Petitioner Waived Her Right to Collaterally Attack Her Sentence

Even if the Petition were timely, it would be denied, because Petitioner knowingly and voluntarily waived her right to challenge her sentence.

The guilty plea agreement that Petitioner signed contained a waiver of her right to appeal or collaterally attack her conviction or sentence, with limited exceptions. In particular, the agreement provided that Petitioner voluntarily and expressly waived all of her rights to appeal or collaterally attack her conviction, sentence, or any other matter relating to the prosecution unless (1) the Government appealed her sentence; (2) her sentence exceeds the statutory maximum; (3) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; or (4) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court. See Transcript of Change of Plea Hearing at 7:21-8:1, Oct. 5, 2012 [hereinafter Hr'g Tr.], ECF No. 165 (filed under seal).

In order to determine whether a defendant's waiver of rights in a guilty plea agreement is knowing and voluntary, a court must "address the defendant personally in open court and inform the defendant of, and determine that the defendant

understands . . . the terms of any provision in a plea agreement waiving the right to appeal or collaterally attack the sentence." United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001) (quoting Fed. R. Crim. P. 11(c)(6)).

At her change of plea hearing, Petitioner acknowledged that she read the plea agreement before she signed it, that she understood it, and that she understood that she waived the right to challenge her conviction or sentence except under the above circumstances. See Hr'g Tr. at 8:9-9:2, 12:20-13:19. In particular, the following exchange occurred:

THE COURT: Do you understand that by pleading guilty, you're giving up the right to appeal on any conviction after trial?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you plead guilty, this will greatly limit your right to appeal and prevent you from using later proceedings like collateral attack and habeas corpus to challenge your conviction, your sentence, or for any other matter?

THE DEFENDANT: Yes.

THE COURT: Do you understand that by pleading guilty, you're greatly limiting your right to appeal your sentence and that the only appeal from your sentence would be if you qualify under one of the following four exceptions: one, if the government appeals your sentence; two, if your sentence exceeds the statutory maximum; three, if the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; or four, if the sentencing judge imposed an

unreasonable sentence above the Sentencing Guideline range.

THE DEFENDANT: Yes.

Id. at 12:20-13:14.

The Court then concluded that Petitioner entered into the plea agreement knowingly, voluntarily, and intelligently.

Id. at 22:6-23:15. Therefore, the waiver was valid, and Petitioner cannot now collaterally attack her sentence. See Khattak, 273 F.3d at 563.

Where there is a valid appellate waiver, a court may nonetheless find it unenforceable if there is the "unusual circumstance" of "an error amounting to a miscarriage of justice." Id. at 562. Whether an appellate waiver is unenforceable is determined on a case-by-case basis. Id.

Courts consider factors such as:

the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Id. at 563 (quoting United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001)). Ultimately, the "miscarriage of justice" exception is to be applied "sparingly and without undue generosity." United States v. Wilson, 429 F.3d 455, 458 (3d Cir. 2005) (quoting Teeter, 257 F.3d at 26).

The Third Circuit has found a waiver of appellate rights unenforceable on the basis of a miscarriage of justice in only a few limited circumstances, such as where ineffective assistance of counsel prevented the defendant from understanding his guilty plea, see United States v. Shedrick, 493 F.3d 292, 298 (3d Cir. 2007); where the defendant should have been permitted to withdraw his guilty plea, see Wilson, 429 F.3d at 458; or where the government breached its own obligations under the plea agreement, see United States v. Schwartz, 511 F.3d 403, 405 (3d Cir. 2008).

With respect to sentencing, in particular, the Third Circuit held that a federal prisoner's argument that he should be resentenced under Booker, 543 U.S. 220, did not fall under the miscarriage of justice exception, because "[t]he possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea." United States v. Lockett, 406 F.3d 207, 212-214 (3d Cir. 2005). The Third Circuit further explained:

Just as subsequent changes in the law do not undercut the validity of an appellate waiver, they do not render the plea itself invalid. The Supreme Court has explained that where subsequent developments in the law expand a right that a defendant has waived in a plea agreement, that change does not make the plea involuntary or unknowing or otherwise undo its binding nature.

Id. at 213.

Here, Petitioner has not argued that any of these limited circumstances apply to her case. Even construing her petition liberally, Petitioner's alleged ground for relief invokes none of these circumstances. Therefore, because Petitioner knowingly and voluntarily waived her right to collaterally attack her sentence and no exception to the waiver's enforceability applies, the Court finds that, even if Petitioner's motion were timely, it would be barred by the waiver.

IV. CERTIFICATE OF APPEALABILITY

When denying a § 2255 petition, a district court must also determine whether to issue a certificate of appealability. 3d Cir. Local App. R. 22.2. A district court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Here, Petitioner has not made a substantial showing of the denial of a constitutional right, and reasonable jurists would not debate the issue. Therefore, the Court declines to issue a certificate of appealability.

V. CONCLUSION

For the foregoing reasons, the Court will grant the Government's motion to dismiss the Petition and deny Petitioner's motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255, without an evidentiary hearing and without issuing a certificate of appealability.

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O R D E R

AND NOW, this **20th** day of **June, 2018**, upon consideration of Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 159), and the Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (ECF No. 163), and for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** that:

1. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 159) is **DENIED**.
2. The Government's Motion to Dismiss Petition Under 28 U.S.C. § 2255 (ECF No. 163) is **GRANTED**.
3. No certificate of appealability shall issue.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.